STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA DOMBROWSKI,

Plaintiff-Appellee,

v

LAUREL CHAPEL, LLC,

Defendant/Cross-Defendant/
Appellant,

and

VILLA DEL SIGNORE, INC.,

Defendant/Cross-Plaintiff/
Appellee.

UNPUBLISHED
April 26, 2012

No. 301484
Wayne Circuit Court
LC No. 09-006917-NO

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Defendant/cross-defendant Laurel Chapel, LLC appeals by leave granted the trial court's order denying its motions for summary disposition. This case arises out of plaintiff Patricia Dombrowski's slip and fall at premises owned by defendant/cross-plaintiff, Villa Del Signore, Inc. and leased by Laurel Chapel. (Villa Del Signore also does business as Laurel Manor and Laurel Manor Banquet and Conference Center.) We reverse and remand.

I. FACTS

Laurel Chapel facilitates weddings on the subject premises (Laurel Chapel's facility). In January 2007, Dombrowski planned to attend her granddaughter's wedding at Laurel Chapel's facility. While Dombrowski was walking into Laurel Chapel's facility, she allegedly fell on black ice in the parking lot. Dombrowski characterized the ice as "black ice on asphalt not visible upon casual inspection." Dombrowski alleged that the "unnatural accumulation of black ice" resulted from water dripping off an awning adjacent to the entrance of the chapel. She further alleged that Laurel Chapel failed to maintain and salt the parking lot.

Dombrowski filed suit against Laurel Chapel, alleging premises liability, negligence, and nuisance. With respect to her premises liability claim, Dombrowski alleged that Laurel Chapel breached its duties to inspect and maintain the parking lot, and to warn invitees of the dangerous

condition that the black ice created. Regarding her negligence claim, Dombrowski alleged that Laurel Chapel breached its duty not to create a situation that allowed for the unnatural accumulation of black ice. And, with regard to her nuisance claim, Dombrowski alleged that Laurel Chapel was in possession and control of Laurel Chapel's facility, land, and structure, and that the condition of the location of her fall constituted a nuisance.

Laurel Chapel asserted in its affirmative defenses that the allegedly dangerous condition was open and obvious. Laurel Chapel also asserted that Dombrowski failed to state a claim of nuisance and that she was comparatively negligent. In response to Dombrowski's requests for admissions, Laurel Chapel contended that the parking lot had in fact been salted on the day of the incident.

Laurel Chapel filed a notice of non-party at fault, naming Villa Del Signore as a potentially responsible non-party because it actually "was the entity that had possession and control of the area where [Dombrowski] allegedly fell[.]" The trial court then granted Dombrowski's motion for leave to amend her complaint to add Villa Del Signore as a defendant. Laurel Chapel asserted the same affirmative defenses in response to Dombrowski's amended complaint but added that it was not liable because it was not the owner and did not have possession and control of the area where Dombrowski allegedly fell.

Villa Del Signore filed a cross-complaint against Laurel Chapel, alleging that Laurel Chapel was obliged to indemnify Villa Del Signore under their lease agreement. Paragraph 2 of the lease agreement described the property to be leased as follows:

> The area known as Unit #1 which is approximately 1525 square feet consisting of the area known as the Chapel, the office area connected to the Chapel, the Dressing Room and the Room next to the Chapel (as well as 235 square feet of common area to be used with others).

And ¶ 13 of the lease provided:

> The Lessor will be responsible for the roof and the four (4) outer walls, *the external concrete and cement,* ceiling tile, floor covering, plumbing, heating, electrical fixtures, doors, door frames, window glass, window casings, window frames, and windows, provided damages are not caused by Lessee or their affiliates, but not any of the appliances or appurtenances of property, or any attachment thereto or attachments to said building or premises used in connection with the Lessee's business.[1]

The lease further provided in ¶ 18 that Laurel Chapel,

> shall keep premises under his control clean and free from rubbish, dirt, *snow and ice on sidewalks at all times,* and it is further agreed that in the event that [Laurel

[1] Emphasis added.

> Chapel] shall not comply with these provisions, the Lessor may enter upon said premises and have rubbish and dirt removed and the area cleaned . . . .[2]

The lease also contained the following indemnity clause:

> Lessee to Indemnify—Insurance
>
> (14) The Lessee agrees to indemnity and hold harmless the Lessor from any liability for damages to any person or *property in, on or about said Leased premises* from any cause whatsoever; and Lessee will procure and keep in effect during the term hereof public liability and property damage insurance for the benefit of the Lessor in the sum of $300,000.00 single limit coverage for damages resulting to one person and $600,000.00 for damages resulting from one casualty, and $100,000.00 property damage insurance resulting from any one occurrence. Lessee shall deliver said policies to the Lessor and upon Lessee's failure to do so, the Lessor may at his option obtain such insurance and the cost thereof shall be paid as additional rent due and payable upon the next ensuing rent day.[3]

Villa Del Signore alleged that indemnity clauses like this one applied to incidents occurring outside the actual leased premises, including in the parking lot.

The lease stated that it was made between Nanci Del Signore Hyman (Hyman) as the lessor, and Christy and Brian Gehringer and Laurel Chapel as the lessee. Hyman, and Christy and Brian Gehringer signed the lease. In its cross-complaint, Villa Del Signore alleged that Hyman signed the lease as a representative of Villa Del Signore. However, in its responsive pleading, Laurel Chapel denied this assertion.

Laurel Chapel moved for summary disposition of Dombrowski's claims under MCR 2.116(C)(10), asserting that it was only a tenant, not the premises possessor. According to Laurel Chapel, the true landlord was John Del Signore, president and owner of Villa Del Signore. In his deposition, Del Signore admitted that Villa Del Signore was not a party to the lease agreement. John Del Signore also admitted that he owned and leased out the premises (including the parking lot) in his personal capacity. John Del Signore explained that Hyman, therefore, signed the lease on his personal behalf. Further, in his deposition, John Del Signore admitted that he was responsible for maintaining and repairing the roof and awning, as well as taking care of snow and ice removal. Therefore, Laurel Chapel argued that it could not be liable for Dombrowski's injuries when it was not in possession and control of the area of her fall. Laurel Chapel next argued that the trial court should dismiss Dombrowski's claim under the open and obvious doctrine. Laurel Chapel pointed out that there was snow, ice, and slush visible near the area at the time of Dombrowski's fall, which should have put her on notice of the potential presence of ice. Finally, Laurel Chapel contended that Dombrowski's nuisance claim

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[2] Emphasis added.

[3] Emphasis added.

should be dismissed because it was duplicative of the premises liability and negligence claims. Villa Del Signore concurred in Laurel Chapel's motion.

Dombrowski responded, arguing that the lease agreement was ambiguous regarding what portion of the premises was included in the lease agreement. Dombrowski also argued that the lease agreement was entered into between Laurel Chapel and Villa Del Signore. But, according to Dombrowski, the testimony and evidence created a question of fact regarding which party—Laurel Chapel or Villa Del Signore—had possession and control of the premises. Despite her testimony that John Del Signore told her that he would handle shoveling and salting the parking lot, Christy Gehringer testified that, on the day of the incident, she or her husband had shoveled and salted the area in which Dombrowski fell. However, Dombrowski asserted that the indemnity agreement indicated that Laurel Chapel was the responsible party. Dombrowski further contended that the black ice was not an open and obvious condition because, although there was snow and slush nearby, there was none in the immediate area where she fell. Dombrowski argued that her negligence claim was independently viable because it was based on water chronically dripping from the awning of the building, of which both defendants were aware but failed to correct. Likewise, Dombrowski argued that her nuisance claim was independently viable because it was based on defendants' creation of the dangerous condition by allowing the water to drip from the awning.

Laurel Chapel also filed a separate motion seeking summary disposition of Villa Del Signore's cross-claim under MCR 2.116(C)(8) and (10), arguing that Villa Del Signore did not have standing to enforce the indemnity agreement where it was not a party to the lease. Even if Villa Del Signore could be considered a party to the lease, Laurel Chapel maintained that, under ¶13 of the lease agreement—stating that "[t]he Lessor will be responsible for . . . the external concrete and cement"—Villa Del Signore, not Laurel Chapel, was responsible for maintenance of the area where Dombrowski fell. Moreover, citing ¶ 2 of the lease agreement, Laurel Chapel argued that the area where Dombrowski fell was not within the scope of the agreement, which did not explicitly cover the outdoor areas of the property.

Villa Del Signore responded, arguing that it was "effectively the landlord" and, thus, entitled to enforce the indemnity clause. Villa Del Signore contended that the indemnity clause, which covered incidents—"in, on or about"—the premises included the area where Dombrowski fell. Therefore, Villa Del Signore requested that the trial court deny Laurel Chapel's motion and grant summary disposition in Villa Del Signore's favor instead.

At the hearing on the motion, the trial court denied Laurel Chapel summary disposition with regard to Dombrowski's premises liability claim, explaining as follows:

> With respect to the premises liable [sic], the Court is satisfied that disposition is denied as to both Defendants. The Court is satisfied there are questions of fact. Who has possession, who has control, and whether the ice was open and obvious.
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> * * *

> Here the lease agreement does state that Del Signore was responsible for the roof and the external concrete and cement. It also states that Laurel Chapel was to keep the premises under his control, free and clear from snow and ice on the sidewalks at all times.
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> Again, I rely on [the Gehringers'] testimony. Further, John [Del Signore] testified that he took care of the snow and ice. Christy [Gehringer] testified she did take it upon herself to salt the carport area.
>
> The Court is satisfied these are questions of fact as to whether either or both of the Defendants had possession or control of the premises as defined under the premises liability law. There are also questions of fact as to whether the ice is open and obvious. Both parties have cited case law in their favor, however, in general, black ice, to be considered open and obvious, there must be some evidence that the black ice would have been visible. In this case we have pictures that do show snow and slush. The Plaintiff testified that [she] had lived in Michigan as if that gives her some sort of expertise, however Dombrowski [plaintiff's husband] did testify, that even after his wife fell, he could not see the ice.
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> Based upon this evidence, the Court is satisfied that reasonable minds would differ as to whether the ice was open and obvious.

With respect to Dombrowski's claims of nuisance and negligence claims, the trial court simply stated, "You don't even deal with those. I don't believe summary disposition is proper at this time." (Laurel Chapel's counsel indicated to the trial court that its original motion had addressed the nuisance and negligence points. But the parties agreed that those issues could be reviewed at a later time.)

The trial court also denied Laurel Chapel's motion regarding the indemnity claim, explaining as follows:

> I do rely on the deposition testimony of John Del Signore. He indicates that he personally owns the property and leased it in his personal capacity. . . . His lease is then signed by Nancy Garringer [sic—Christy Gehringer], [who] does testify that it was her understanding that the lease was with John and Laurel Manor. And in the response to Laurel Manor's [sic—Chapel's] summary deposition [sic], Villa argued that it was effectively the owner and/or the landlord of the property.
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> The Court is satisfied given this evidence there is issues of fact [sic] as to whether Villa was the lease owner and whether we [sic] could be held liable for the Plaintiff's injuries. If there is a determination by the trier of fact that the Defendant Villa was a party to the lease and has rights as such, the Court is satisfied then under a (c)(10), but after that, the trier of fact makes that determination, then a (c)(10) would be in favor of Laurel Chapel on the cross claim. That would be the paragraph 14 of the lease which expressly states Laurel

> Chapel will indemnify the lessor for quote, damages for any person or property in, on or about the lease premises.
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> The Court is satisfied the indemnification provision does not apply to the area of the Plaintiff's fall, but there was, the lessor who took responsibility for salting that area. So the Court is not gonna grant the summary disposition at this time.

The trial court's order denied both of Laurel Chapel's motions for summary disposition for the reasons stated on the record.

Laurel Chapel moved for reconsideration, citing Dombrowski's deposition, which was taken after the motion was filed. In that deposition, Dombrowski admitted that, before she fell, she had observed conditions that would have indicated that a potentially hazardous condition existed. The trial court denied the motion, ruling that it could not rely on new evidence regarding the open and obvious danger doctrine. Further, the trial court stated that there was a genuine issue of material fact regarding possession and control when comparing ¶ 13 of the lease agreement to ¶ 18 and when comparing John Del Signore's testimony to that of Christy Gehringer.

Laurel Chapel now appeals.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.[4] The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.[5] The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.[6] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[7] "'[T]he court is not permitted to assess credibility, or to determine facts on a motion for summary judgment.'"[8] Further, where a trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the court looked

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[4] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

[5] MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

[6] *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[7] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[8] *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 265; 632 NW2d 126 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)[.]"[9] This Court reviews de novo a trial court's rulings on motions for summary disposition.[10]

If a contract's language is clear, its construction is a question of law that is subject to this Court's de novo review.[11] Also, whether contract language is ambiguous is a question of law subject to this Court's de novo review.[12] But interpretation of an ambiguous contract is a question of fact that a jury must decide.[13]

B. LAUREL CHAPEL'S POSSESSION AND CONTROL OF THE PREMISES

Laurel Chapel argues that it should have been dismissed from the case because the area where Dombrowski fell was not under its possession and control.

Premises liability law in Michigan is conditioned on possession and control.[14] "[P]ossession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property."[15] Although possession and control are incidents of title ownership, they may be loaned to another.[16] "'It is a general proposition that liability for an injury due to defective premises ordinarily *depends upon power to prevent the injury*[.]'"[17]

The lease agreement provided in ¶ 18 that Laurel Chapel, "shall keep premises under his control clean and free from rubbish, dirt, *snow and ice on sidewalks at all times . . . .*"[18] Further, evidence supported that the Gehringers salted the area before Dombrowski fell. These two facts indicate that Laurel Chapel assumed responsibility—that is, exercised dominion and control—over the area where Dombrowski fell. The fact that John Del Signore hired a landscape

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[9] *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[10] *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009).

[11] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Hafner v DAIIE*, 176 Mich App 151, 156; 438 NW2d 891 (1989).

[12] *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

[13] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003).

[14] *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998); *Merritt v Nickelson*, 407 Mich 544; 287 NW2d 178 (1980).

[15] *Kubczak*, 456 Mich at 661.

[16] *Id.* at 662; *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 568; 563 NW2d 241 (1997).

[17] *Kubczak*, 456 Mich at 662, quoting *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942) (emphasis by *Kubczak*).

[18] Emphasis added.

company to perform general snow removal in the parking lot does not obviate the fact that Laurel Chapel admittedly took it upon itself to maintain the specific area where Dombrowski fell.[19]

The trial court found that the lease agreement was ambiguous regarding the issue of control over the subject area, pointing out that ¶ 13 of the lease provides, "The Lessor will be responsible for the roof and the four (4) outer walls, *the external concrete and cement*, ceiling tile, floor covering, plumbing, heating, electrical fixtures, doors, door frames, window glass, window casings, window frames, and windows, provided damages are not caused by Lessee or their affiliates . . . ."[20] However, a reasonable reading of this provision, which refers to "damages" to the enumerated items, indicates that the clause covers responsibility for repairs, not general maintenance, such as snow and rubbish removal, which are specifically accounted for in ¶ 18. And it is a general tenet of contract construction that "[s]pecific provisions in a contract normally override general provisions."[21]

Accordingly, we conclude that the trial court erred in concluding that a genuine issue of material fact existed on this point such that summary disposition would be improper.

C. APPLICATION OF OPEN AND OBVIOUS DOCTRINE

Laurel Chapel argues that the trial court erred in failing to apply the open and obvious danger doctrine to dismiss Dombrowski's claim. We first note that this argument appears at odds with Laurel Chapel's contention that it was not in possession and control of the premises. However, we view this argument as merely an alternative argument in the event that we conclude, as we have, that Laurel Chapel was in fact a possessor of the land at the time of the incident. Thus, the open and obvious doctrine was available to it as a defense.

The duty that an occupier of land owes to a visitor depends on the status of the visitor at the time of the injury.[22] A visitor can be a trespasser, a licensee, or an invitee.[23] Here, it is undisputed that Dombrowski was an invitee. And a "possessor of land has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land."[24] But the duty of a premises possessor is not absolute[25] and does not

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[19] See *Kubczak*, 456 Mich at 661-662 ("If we were to accept the [defendant's] formulation, one who wrongfully exercised dominion and control over property would escape liability solely on the basis that there was no legal or theoretical possession.").

[20] Emphasis added.

[21] *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005).

[22] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

[23] *Id.*

[24] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

[25] *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990).

extend to open and obvious dangers.[26] The determination of whether a condition is open and obvious is a question of law for the Court to decide.[27]

Whether a danger is open and obvious depends upon whether an average user with ordinary intelligence would have been able to discover the danger upon casual inspection.[28] Absent special circumstances or a statutory duty, the hazards presented by visible ice and snow are generally open and obvious and do not impose a duty on the property owner to warn of or remove the hazard.[29] Only if there is some special aspect that makes the accumulation unreasonably dangerous must a possessor of land take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to an invitee.[30]

Here, Dombrowski argued below that the ice on which she slipped and fell was not open and obvious because it was "black ice on asphalt not visible upon casual inspection." Black ice by definition is transparent, or nearly invisible, and without evidence that it would have been visible upon casual inspection or other indication of a potentially hazardous condition, this Court has held that it does not present an open and obvious danger.[31] Indication of a potentially hazardous condition may include circumstances such as the presence of snow in the area or covering the ice, the recent occurrence of any type of precipitation combined with freezing temperatures, or a situation where the plaintiff observed others slipping.[32] A court may also consider a plaintiff's experience as a Michigan resident.[33]

The trial court concluded that there was a question of fact regarding whether the ice was open and obvious:

> [I]n general, black ice, to be considered open and obvious, there must be some evidence that the black ice would have been visible. In this case we have pictures that do show snow and slush. The Plaintiff testified that [she] had lived in Michigan as if that gives her some sort of expertise, however Dombrowski [plaintiff's husband] did testify, that even after his wife fell, he could not see the ice.

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[26] *Hammack v Lutheran Social Servs of Mich*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

[27] *Knight v Gulf & Western Prop, Inc*, 196 Mich App 119, 126; 492 NW2d 761 (1992).

[28] *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008).

[29] See *Id.* at 479-481; *Benton v Dart Properties Inc*, 270 Mich App 437, 443 n 2; 715 NW2d 335 (2006).

[30] *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004).

[31] *Slaughter*, 281 Mich App at 483.

[32] *Id*. at 479-481.

[33] *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007).

In so holding, the trial court appears to have based its decision on weighing the evidence that depicted indicia of a potentially hazardous condition against Dombrowski's husband's testimony that the ice was not actually visible upon casual inspection. However, in doing so, the trial court gave undue weight to the husband's testimony regarding the visibility, or lack of it, of the black ice itself. There was no dispute that snow and slush were present near the area where Dombrowski fell—the pictorial evidence and Dombrowski's husband's own testimony supported that fact. Moreover, in her deposition, Dombrowski testified that she observed snow flurries on the day of the incident, that the ground felt slippery while she was walking up to area where she actually fell, that she saw snow on the ground nearby, and that she was a life-long Michigan resident. The indicia of a potentially hazardous condition were sufficient to allow a conclusion as a matter of law that the black ice, although not actually visible upon casual inspection, was an open and obvious danger.

Additionally, to the extent that Dombrowski argued that the water dripping from the awning was a special aspect that made the accumulation of black ice unreasonably dangerous, we find that argument without merit. The allegedly unnatural circumstances of the accumulation of the ice in this case did not differentiate the risk associated with it from the risk typically associated with other naturally icy surfaces.

Accordingly, we again conclude that the trial court erred in ruling that a genuine issue of material fact existed on this point such that summary disposition would be improper.

Because we conclude that the black ice at issue was open and obvious, Laurel Chapel was not liable for Dombrowski's claims. Thus, Laurel Chapel was entitled to summary disposition on Villa Del Signore's cross-claim based on the indemnification clause as well.

We reverse and remand for entry of an order granting Laurel Chapel's motions for summary disposition. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck